

April 17, 2003

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Secretary  
Federal Communications Commission  
TW-A325  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: Ex Parte Communication Responding To December 11, 2002 Ex Parte  
Filed by PaeTec Communications and Outside Connection, CC  
Docket No. 96-128**

Summary

On December 11, 2002, PaeTec Communications and Outside Connection, hereinafter referred to as "OC," filed an ex parte letter asking the Commission to generally consider relying on remote call forwarding as a method to bring competition to the inmate payphone market, and specifically to prohibit WorldCom from blocking calls to OC for its practice of forwarding inmate payphone calls.

On March 19, 2003, OC filed a Petition for Declaratory Ruling (PDR) raising the identical issues. Yesterday, MCI filed the following comments and attachments in response to OC's PDR. MCI hereby submits these comments and attachments also in response to OC's December 11, 2002 ex parte.

If you have any further questions please contact me at the number listed below.

Sincerely,

**Larry Fenster**

Larry Fenster  
202-736-6513

cc: Tamara Preiss  
Joi Nolen



**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	<b>DA 03-874</b>
<b>Petition for Declaratory Ruling</b>	)	<b>WCB/Pricing 03-14</b>
<b>Filed by Outside Connection, Inc.</b>	)	

**COMMENTS OF WORLDCOM, INC.**

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April 16, 2003

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## **EXECUTIVE SUMMARY**

Correctional facility authorities are pledged with the difficult and important task of maintaining the security of inmates as well as the security of the public. Correctional facilities, ranging from county jails, state prisons, federal prisons, to Immigration and Naturalization Service detention facilities, uniformly rely on a single provider of inmate telephone services because it gives them the greatest ability to maintain prison security and protect the public. In today's heightened security environment, correctional facilities are owed the greatest deference to establish the telecommunications systems that most enhance security. The potential threats to public safety are not imagined. For example, the New York Department of Corrections currently incarcerates some of the perpetrators of the first bombing of the World Trade Center in 1993. In its Petition for Declaratory Ruling, Outside Connection ("OC") asks the Commission to take steps that would undermine prison security, not only in New York State, but in every correctional facility in the nation.

OC has petitioned the Commission to require MCI to make its collect call inmate operator service available as a wholesale service against its wishes, to prohibit MCI from blocking lines when OC's customers refuse to pay for collect calls they knowingly accepted from MCI, and to preempt DOCs ban on remote call forwarding and reliance on a single provider of inmate calling service. The Commission should immediately, and unconditionally, deny each of these requests.

As an initial matter, OC's petition is procedurally deficient. OC has already filed a lawsuit in federal court seeking a preliminary injunction against MCI from blocking calls to its customers. This adjudicatory proceeding was the appropriate venue to resolve

this issue since OC's complaint hinges primarily upon the terms of a voluminous contract between MCI and DOCs, and the specific circumstances under which MCI first began to block calls to OC's customers. Now that OC is about to have its case dismissed, possibly with prejudice, it has attempted to recast its dispute in general policy terms, in order to circumvent the Section 207 bar on pursuing a claim from a common carrier in more than one jurisdiction. The adjudicatory proceeding pending before the Court, not a declaratory ruling, is the most appropriate vehicle for resolving the issues raised in OC's petition. The Commission should not be fooled by OC's attempted subterfuge.

In the event the Commission does consider the merits of the policy issues contained in OC's Petition, it must also reject the conclusions OC reaches in its petition. OC first maintains that MCI must make its inmate collect call service available on a wholesale basis, pursuant to Section 251(b) of the Telecommunications Act of 1996. OC's conclusion is completely dependent on a finding that MCI's inmate collect call service is a local exchange service. But MCI's service is an inmate operator service. Calls made by inmates are billed collect to the called party. MCI identifies itself to consumers before they accept an inmate-originated call, discloses to them how they may obtain the cost of the call, and allows them to terminate the call without incurring charges before the call is connected. Each of these features is a defining component of an operator service. Providers of operator services are not required to make their services available on a wholesale basis. Moreover, because OC's customers have heard MCI's disclosure before accepting the call, they have entered into an agreement to pay for the completed call. MCI is entitled to block calls to its customers if they refuse to pay for its service.

OC next asks the Commission to preempt DOCs' decision to rely on a single provider of inmate calling services, pursuant to Section 253 of the Telecommunications Act of 1996. OC's argument is completely dependent on showing that DOCs did not have a valid penalogical objective in choosing to rely on a single provider of inmate calling services. While Section 253 of the Act prohibits States from enacting laws or rules which inhibit competition, Congress explicitly exempted laws designed to protect the public safety from this requirement, recognizing dozens of Court cases allowing correctional authorities to restrict inmate access to telecommunications, and to rely on single providers of telecommunications, in order to achieve valid penalogical objectives.

When confronted with OC's violation of DOCs' ban on remote call forwarding, DOCs undertook a good faith effort to evaluate the extent of the threat to public safety and prison security posed by OC. DOCs gathered information on OC's practice, tested the security risk mitigation practices proposed by OC, and evaluated its ability to require companies without contractual obligations to meet ongoing security requirements. On the basis of this evaluation, DOCs concluded that allowing a proliferation of remote call forwarding companies such as OC would be complicated, impose extensive costs on its limited resources, and hence threaten its ability to maintain prison security and protect the public. Congress, the Courts, and the Commission have consistently recognized that inmates have limited rights to telecommunications access, and have consistently deferred to the policies correctional authorities have adopted to protect the public safety. The wisdom of this longstanding policy now should not be challenged.

**Before the  
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<b>Filed by Outside Connection, Inc.</b>	)	

**COMMENTS OF WORLDCOM, INC.**

WorldCom, Inc., on behalf of MCI WorldCom Communications, Inc. (“MCI”), hereby submits its comments on the Petition filed by Outside Connections (“OC”) for a Declaratory Ruling (“OC Petition”) filed with the Federal Communications Commission (“FCC” or “Commission”) on March 19, 2003. MCI strongly opposes the instant Petition for the reasons set forth herein.

**I. BACKGROUND: MCI’S CONTRACT WITH DOCs**

Beginning in August 2000, MCI responded to a request of the New York Department of Correctional Services (“NY DOCs” or “DOCs”) seeking competitive bids to provide secure, inmate calling services to the 70 correctional facilities it manages in the state of New York. DOCs offered its request for proposals and specified the security features to be included in competitive bids pursuant to powers granted it under the New York State Correction Code,



which empowers it to manage “all matters relating to the government, discipline, policing, contracts and fiscal concerns [of New York’s correctional facilities].”<sup>1</sup> While all eligible vendors were entitled to compete for this contract, OC did not submit a proposal, but PaeTec did participate in an initial proposal meeting. DOCs determined that MCI’s proposal best fulfilled the security and service requirements contained in its request for proposals, and on August 1, 2001, MCI and DOCs entered into a 5-7 year agreement whereby MCI would be the exclusive provider of telephone services from DOCs’ facilities (“DOCs Agreement”).

Under the terms of this contract and specific directions from DOCs, MCI has a number of requirements that are relevant to the issues raised by OC.<sup>2</sup> MCI must:

- provide DOCs with a secure telephone system for DOCs’ inmates,
- allow inmates to place collect-only telephone calls to pre-approved numbers,
- ensure that calls are not forwarded from pre-approved number lists,
- block calls, once it is discovered they are being forwarded,
- provide DOCs with a detailed flowchart/diagram of the entire call process from the moment an inmate picks up the receiver to the disconnection or completion of the call,
- provide DOCs with real time and batch file transfer of the billing, name, address (“BNA”) information associated with each call, and
- bill, collect, and reimburse DOCs a commission for each completed call.

DOCs has a high degree of confidence that MCI will provide and maintain a secure inmate communications system, not only because it reviewed and approved the facilities and services MCI proposed in its competitive bid, but also because MCI has

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<sup>1</sup> N.Y. Correct. Law § 112(1) (2003) ([http:// www.assembly.state.ny.us/leg/?cl=22&a=9](http://www.assembly.state.ny.us/leg/?cl=22&a=9)).

<sup>2</sup> See *MCI, Inc., et. al., v. Outside Connection, Inc., Case No. 02/13533, Chapter 11 Adversary Proceeding No. 02/8092A (AJG), Affidavit of Stephen D. Viefhaus* (“Viefhaus Affidavit”) (Appended hereto as Attachment 1) at 6-18.

posted a \$7 million performance bond guaranteeing that it will carry out the provisions in its contract. DOCs has the right to unilaterally and immediately terminate the DOCs Agreement and seek another provider of inmate communications services if MCI breaches its obligations and fails to correct them within 10 days after receiving written notice. MCI would also be required to pay all DOCs' attorneys' fees in the event legal action is taken against MCI pertaining to the DOCs Agreement.<sup>3</sup>

MCI, and only MCI, has assured DOCs that it can meet DOCs' security requirements. In that regard, DOCs is entitled to order MCI to block any calls that may present security concerns. Specifically, MCI is required to block calls placed to individuals who refuse to pay their bills or are attempting to defraud MCI or where it does not have a billing and collection agreement with a local exchange company ("LEC"), or when BNA is not available and cannot be confirmed through direct contact.<sup>4</sup>

DOCs considers any call forwarding scheme to be a potential breach of prison security. It is therefore prohibited under its regulations<sup>5</sup> and pursuant to the DOCs Agreement. Call forwarding may allow an inmate to circumvent the numbers on his or her approved list in order to intimidate witnesses, judges, and jurors, or to engage in criminal activity from within the correctional facility. Knowing where a telephone call

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<sup>3</sup> Viefhaus Affidavit at 14-15.

<sup>4</sup> *Id.* at 11.

<sup>5</sup> See Title 7, New York Code, Rules and Regulations, Department of Correctional Services, Chapter VIII, Institutional Programs, Part 723, Inmate Telephone Calls. (7 NYCRR § 723.3(e)(11)) (appended hereto as Attachment 2).

terminates and who receives the call provides information that is often instrumental in preventing such criminal activities.

Under the terms of the DOCs Agreement, MCI is entitled to bill for completed calls. MCI is also required to reimburse DOCs for each completed call, even if it is unable to collect a payment for them. If an inmate call is carried by a LEC with whom MCI has a billing and collection agreement, a completed call will be billed to the called party's automatic number identifier (ANI). If an inmate call is terminated by other LECs, such as PaeTec, MCI will call the number at issue and first attempt to verify that the called party was aware that a collect call was accepted at their number, and then obtain billing information from the answering party. If the called party does not verify they accepted the collect call, or refuses to provide billing information, MCI will inform the called party that a block will be placed on the line if they do not provide billing information within 24 hours.

As summarized above, MCI is authorized by DOCs to block calls when: 1) calls are placed to individuals who refuse to pay their bills or are attempting to defraud MCI, 2) when there is no billing and collection agreement with a customer's LEC, or 3) when BNA is not available and cannot be confirmed through direct contact. This policy protects both called parties and MCI against possible toll fraud. MCI will also turn over such calls to a billing and collection agent who will make a number of attempts to collect for completed calls.

MCI had no knowledge that OC had begun to lease local service access numbers from PaeTec or that call forwarding services from those numbers were being marketed to inmate families. MCI also did not have a billing and collection agreement with PaeTec.

In such instances, it is MCI's practice to contact the party who accepted the collect call and discuss payment arrangements. At the end of August and beginning of September 2002, MCI attempted to verify BNA and obtain compensation from five phone lines leased through PaeTec. MCI left messages that the lines would be blocked within 24 hours unless billing information was provided. After not receiving billing information, MCI then blocked calls to these numbers. As discussed above, MCI's contract with DOCs entitled it to take such action.<sup>6</sup> At this point, MCI was unaware that the called parties had subscribed to OC's call forwarding service, and having not received any billing information from them, blocked calls to these numbers. It was only after these numbers were blocked, and OC's customers complained to DOCs, that DOCs and MCI learned of OC's remote call forwarding business practices.

## **II. OC'S PETITION IS PROCEDURALLY DEFICIENT**

As an initial matter, MCI believes that the proper vehicle for resolution of this dispute is a formal complaint, not a petition for declaratory ruling. OC's petition is directed at a specific set of facts surrounding the actions of MCI and the New York DOCs. In fact, this dispute has been in litigation before Judge Gonzalez, U.S. Bankruptcy Court, Southern District of New York ("SDNY") (the "Court") for more than seven months.

OC has filed a lawsuit seeking damages from MCI for its blocking of calls from DOCs inmates to OC's customers. OC also sought a temporary restraining order and a

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<sup>6</sup> The FCC's rules allow call blocking from correctional facilities. *See In the Matter of Policies and Rules Concerning Operator Service Providers, Report and Order* ("TOCSIA Order"), CC Docket No. 90-313, RM 6767, 6 FCC Rcd 2744 (1991), & 15. See also, *Billed Party Preference for InterLATA 0+ Calls, Second Further Notice of Proposed Rulemaking* ("Second BPP FNPRM") 11 FCC Rcd 7274 (1996), at 48.

preliminary injunction against MCI's blocking practices, but both motions were denied. The Court cited security concerns and also held that OC had little likelihood of success on the merits of its claims. The very same facts stemming from the court proceeding form the basis of the instant petition.<sup>7</sup>

Having twice lost in Court to stop the legitimate call blocking by MCI, OC is desperate to keep its alleged cause of action against MCI alive. First, OC filed a detailed *ex parte* in CC Docket No. 96-128, then OC encouraged its customers to file informal complaints against MCI<sup>8</sup> and now, OC has filed its own petition for a declaratory ruling – a carbon copy of its *ex parte*. In addition, MCI has recently learned that OC has filed an Article 78 proceeding against DOCs in New York State Supreme Court, Albany County based upon DOCs' action banning OC from advertising its services in the correctional facilities. The instant petition is the latest delay tactic designed to harass MCI and allow OC to provide a service it is otherwise not permitted to provide.

In order to prevent its case against MCI and DOCs from being dismissed with prejudice by the Court, OC has offered instead to withdraw its case after seven months of litigation. In its desperate attempt to prevent a dismissal with prejudice, OC entered a

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<sup>7</sup> In fact, MCI believes that OC is precluded from further "litigating" its claim at the Commission. Judge Gonzalez's decision on the merits of OC's claims is expected by April 23, 2003. Such a judgment would bar further consideration of OC's claim because OC's Petition and OC's case before the Court: 1) share a common nucleus of operative facts, 2) will have resulted in a final judgment on the merits, and 3) involve the same parties. *Cf. TeleServices Industry Association ("TSIA") v. AT&T Corp.*, 15 FCC Rcd 21454 (2000) (finding that the requirements for res judicata were satisfied when a complaint was filed after a court action was sought). OC's claims may be "dressed in somewhat different clothing than those asserted before the [ ] court," but OC's Petition is a re-litigation of its court action and should not be tolerated. *TSIA* at 21458.

<sup>8</sup> See Letter from OC to its customers encouraging them to write complaints about MCI and DOCs (appended hereto as Attachment 3).

copy of this petition and the Commission's public notice into evidence with the Court. OC then informed the Court of "a new fact that is relevant to the pending motion of OC to dismiss its lawsuit for damages against the above defendants without prejudice so that the FCC may consider whether the defendants' blocking of the OC service violates FCC regulatory policy."<sup>9</sup>

As OC recognized when it chose its forum, an adjudicatory proceeding is more conducive for this particular dispute. A petition for declaratory ruling has traditionally sought clarification of questions of law of general applicability. Petitions are not to be employed to adjudicate narrow, fact-laden disputes between two parties. To be sure, the Commission has recognized that declaratory rulings are inappropriate for issues solely impacting two parties with little or no general applicability.<sup>10</sup> While MCI recognizes that

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<sup>9</sup> See Letter, from Salvatore S. Russo, Outside Connections to Judge Gonzalez, U.S. Bankruptcy Court, SDNY, filed March 26, 2003 (appended hereto as Attachment 4). OC went so far as to characterize the Commission's "decision to invite comment on OC's petition" as an "indicat[ion] that the agency considers the arguments raised by OC in the petition to be serious since the FCC invites comment only on petitions for declaratory ruling that it believes it may be interested in deciding. By stating that the FCC 'may' issue a declaratory ruling in response to a petition but that it is not required to do so, both FCC rules and the Administrative Procedure Act make plain that the agency has broad discretion to ignore petitions for declaratory ruling." OC offered no valid basis for its claims.

<sup>10</sup> In *the Matter of Trac Communications, Inc., Complainant, v. Detroit Cellular Telephone Company, Defendant*, Order, DA 88-1222, 3 F.C.C.R. 4864 (rel. Aug. 12, 1988) ("*Trac Communications*"), the Commission was faced with a situation where certain issues were referred to the Commission under the doctrine of primary jurisdiction. One party filed a complaint and the other filed a petition for declaratory ruling. The defendant thereafter filed a motion to consolidate the formal complaint proceeding and its petition for declaratory ruling with the petition "becoming the surviving document." The Commission agreed that consolidating the proceedings was warranted, but found that a declaratory ruling was inappropriate because "[t]he issues ... [presented in the referral] appear to have little, if any, general applicability, other than the precedential value their resolution may ultimately have. Rather, the issues arise from a dispute involved directly with and enveloped solely by the two parties...." *Trac Communications*, & 3.

the issue of inmate prison payphones is an issue that has broader applicability, OC's petition is directed specifically at MCI and DOCs because OC seeks a "ruling declaring that the blocking by [MCI and DOCs] of OC's long distance telephone service is unlawful as a matter of communications policy."<sup>11</sup> Resolution of this dispute requires the Commission and commenting parties to be fully knowledgeable of the underlying facts in order to review and provide meaningful comments and recommendations. That cannot be done here.

"A declaratory ruling may be used to resolve a controversy only if the facts are clearly developed and essentially undisputed."<sup>12</sup> By contrast, in this case, the facts are very much in dispute. Many of the facts OC presents in its petition are also misleading and false. First, the Commission and prospective commenters cannot offer meaningful input because MCI's actions are governed by a lengthy contract, which is not part of the record in this proceeding. Second, OC has grossly misrepresented the facts leading up to MCI's blocking of calls to OC's call forwarding service, the nature of MCI's inmate calling services, the nature of its contract with DOCs, and most importantly DOCs' ability to maintain prison security as a result of OC's call forwarding service. Absent information about the nature of MCI's service and DOCs' security concerns, MCI seriously questions the ability of other parties to comment on this particular dispute. Commenters can only provide general comments, which would be helpful were OC's petition not specifically aimed at MCI and DOCs.

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<sup>11</sup> OC Petition, Summary.

<sup>12</sup> *American Network, Inc.*, 4 FCC Rcd 550, & 18 (1989); *See also, American Telephone and Telegraph Co.*, 3 FCC Rcd 5071 (1988) (stating that a petition for declaratory ruling can be used as a substitute for a section 208 complaint if the facts are undisputed).

MCI therefore believes that the adjudicatory proceeding pending before the Court, not a declaratory ruling, is the more appropriate vehicle for resolving the issues raised in the petition.

### **III. OC'S PETITION IS WITHOUT MERIT**

As discussed above, due to numerous procedural violations, the Commission should immediately dismiss Outside Connection's Petition. In the event the Commission proceeds to consider the merits of policy issues contained in OC's Petition, it will find there are only two policy issues: 1) is a provider of inmate operator services required to make available to other telecommunications carriers its operator services; and 2) does the Commission have broad discretion to regulate state departments of correction telecommunications policies, in particular, the universal practice of awarding contracts to provide exclusive inmate operator services to a single telecommunications carrier? The resolution of all other issues and arguments OC raises are controlled by the answers to these two questions. The following discussion reveals a complete lack of merit to OC's Petition.

#### **A. MCI Is Not Required To Offer Its Maximum Security Collect Call Service On A Wholesale Basis**

##### **1. MCI Is A Provider Of Inmate Operator Services**

OC rests its argument that MCI may not block calls to its customers on the claim that MCI is providing local exchange service, and therefore must, pursuant to Section 251(b) of the Telecommunications Act of 1996, allow OC to resell this service.<sup>13</sup> OC misunderstands the service that MCI is providing. MCI's Maximum Security Collect Service is an inmate operator service. As defined in the Commission's rules, an inmate operator service is:

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<sup>13</sup> OC Petition at 9.



“...any interstate telecommunications service initiated from an inmate telephone that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than (i) Automatic completion with billing to the telephone from which the call originated; or (ii) Completion through an access code used by the consumer with billing to an account previously established with the carrier by the consumer.”<sup>14</sup>

MCI’s service functions as an inmate operator service. Calls made by inmates are billed collect to the *called* party, who are the “consumers” in this case.<sup>15</sup> MCI also identifies itself to consumers before they accept an inmate-originated call, discloses to them how they may obtain the cost of the call, and permits them to terminate the call without incurring charges before the call is connected.<sup>16</sup> It is noteworthy that when OC’s customers listen to MCI’s disclosure message, and then accept a call, they acknowledge, not only that MCI is a provider of inmate operator services, but also *the* provider authorized to bill them for the collect call.

OC’s belief that the origination and termination of an operator-assisted call within a local exchange area renders it a local exchange service is incorrect. An operator service is characterized by the assisted completion of a call which is not automatically billed to the calling party’s number or their prepaid card or calling card. In contrast, local exchange service is characterized by call completion automatically billed to the calling party’s telephone number via the exchange service charge, i.e. without the intervention of an operator. Local exchange service also includes the ability for the billed party to originate and terminate a telephone call:

The term “telephone exchange service” means (A) service within a telephone exchange ... operated to furnish to subscribers intercommunicating service of the

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<sup>14</sup> 47 C.F.R. § 64.710(b)(3).

<sup>15</sup> See 47 C.F.R. § 64.710(b)(1).

<sup>16</sup> See 47 C.F.R. § 64.710(a). See also MCI’s disclosure script (appended hereto as Attachment 5).

character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service ... by which a subscriber can originate and terminate a telecommunications service.<sup>17</sup>

MCI's Maximum Security Collect Service does not allow the billed party to originate a call, nor does it include the ability to complete calls with automatic billing to the calling party via an exchange service charge.

MCI's Maximum Security Collect Service is clearly an operator service and not a local exchange service. Since the resale obligations of Section 251(b) are limited to providers of local exchange service and do not include providers of operator services, MCI has no obligation to make its Maximum Security Collect Service available for resale.

2. OC Fraudulently Holds Itself Out As A Provider Of Inmate Operator Services

OC contends that it has been providing long distance collect call service to its customers. OC's tariff, filed with the New York Public Service Commission describes its services as an "interexchange collect call service ... that provides the customer the ability to receive collect calls from a specified location designated by the customer in another exchange area."<sup>18</sup> Yet, if OC is indeed a provider of collect call service, it does not comply with the Commission's requirements to identify itself as the provider of the call, provide information on how to obtain the cost of the call, or give the called party the option of declining to accept the call. Nor does OC inform its subscribers that, by accepting a call that has been identified as being provided by MCI, they enter into a contractual obligation to pay MCI, and not OC, for the completed call. Moreover, by providing inaccurate rate information through the literature and rate plans that it

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<sup>17</sup> 47 U.S.C. § 153(47).

<sup>18</sup> See Outside Connection Interexchange Collect Call Service Tariff (appended hereto as Attachment 6 at 9-10). See also OC Petition at 1.

provides its customers, OC is interfering with MCI's ability to comply with the Commission's disclosure rules.

### 3. MCI Is Entitled To Block Calls To OC

Given that MCI is not obligated to allow OC to use its lines, and that OC's customers have acknowledged MCI to be the provider of collect calls from prison facilities, it becomes clear that MCI is entitled to block calls to OC and its customers. When OC's customers accept collect calls identified as being provided by MCI, they enter into an agreement to pay for the call. When they refuse to pay, MCI is entitled to block future calls. Similarly, when MCI discovers that OC is exploiting the capabilities of remote call forwarding to gain unauthorized access to its inmate operator service, OC is stealing its service, and is no different than persons who purchase cable converters in order to pirate premium channel cable signals.<sup>19</sup> MCI is entitled to deny future access when it discovers this piracy.

In response to OC's claim that MCI performed line information database ("LIDB") dips, and therefore should have been able to identify OC as the party leasing the telephone numbers in question, the Commission should know that MCI was unaware of the existence of OC when it first began to block calls to its customers.<sup>20</sup> The unpaid bills associated with those calls were of sufficient magnitude to trip MCI's high toll fraud filters. MCI's high toll fraud control procedures do not involve the use of LIDB dips. Rather, those numbers suspected of fraud are dialed, and attempts are made to verify with the called party that the call was not accepted without approval of the end-user leasing that number. The line is blocked if the end user does

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<sup>19</sup> OC therefore has no Section 253 claim to be protected from state regulation prohibiting its service, since it is not providing a legitimate telecommunications service.

<sup>20</sup> OC Petition at 10-11.

not verify the call as legitimate, which is what occurred for these calls. It was only after OC complained to DOCs about the blocks placed by our High Toll Fraud Group that DOCs and MCI became aware of OC's remote call forwarding service. After determining that OC's service posed a risk to prison security, DOCs ordered MCI to block all calls to OC. Further, OC might want MCI to purchase BNA from PaeTec, and then allow OC to use its operator service, but MCI has absolutely no obligation to do so.

**B. Prison Officials Are Owed Great Deference in the Implementation of Inmate Telecommunications Policy**

1. Federal Courts Have Granted Prison Officials Broad Discretion To Establish Telecommunications Policies Which Comport With Valid Penological Objectives, Including The Use Of Exclusive Contracts With Inmate Calling Service Providers

Federal courts have generally recognized that balancing the public safety against the rights granted prisoners is a complex task. As the Supreme Court has recognized, "limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security."<sup>21</sup> Federal courts have therefore deferred to prison officials' implementation of these goals. "We are keenly aware that federal courts owe great deference to the expertise of the officials who perform the 'always difficult and often thankless task of running a prison.'"<sup>22</sup>

This deference extends to the telecommunications access policies adopted by a prison authority. An inmate "...has no right to unlimited telephone use." Instead a prisoner's right to

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<sup>21</sup> *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400, 2404, 96 L. Ed. 2d 282 (1987).

<sup>22</sup> *Salaam v. Lockhart*, 856 F.2d 1120, 1122 (8th Cir. 1988).

use a telephone is “subject to rational limitations in the face of legitimate security interests of the penal institution.”<sup>23</sup> Similarly, the “exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny for unreasonable restrictions.”<sup>24</sup>

Federal courts have granted discretion to prison authorities to receive commissions and to grant exclusive contracts to inmate telephone service providers. “By what combination of taxes and user charges the state covers the expense of prisons is hardly an issue for the federal courts to resolve....State and other public agencies do not violate the antitrust laws by charging fees or taxes that exploit the monopoly of force that is the definition of government. They have to get revenue somehow, and the ‘somehow’ is not the business of the federal courts unless a specific federal right is infringed.”<sup>25</sup>

## 2. The Commission Has Consistently Deferred to Prison Authorities Regarding Inmate Telephone Systems

The Commission has followed the courts in recognizing that the complex task of balancing communications needs of inmates against prison security is properly handled by prison authorities.

“Inmate-only payphone service is not a service that must be offered on a regulated basis to ensure its availability. Availability is determined by the institutional

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<sup>23</sup> *Strandberg v. City of Helena*, 791 F. 2d 744, 747 (9th Cir. 1986). Indeed, not all states grant inmates the right to use a telephone system. In Texas, for example, the Texas Department of Criminal Justice has never competitively bid for the installation of an inmate telephone system for use in state-managed facilities. In general, inmates do not have phone privileges. Inmates may however, be allowed to make periodic collect calls using the state’s administration phone system.

<sup>24</sup> *Fillmore v. Ordonez*, 929 F. 2d. 1544, 1563-64 (D. Kan 1993), *aff’d*, 17 F.3d 1436 (10<sup>th</sup> Cir. 1994).

<sup>25</sup> *Arsberry v. Illinois*, 244 F. 3d 558, 564-66.

concerns of prison authorities....Additionally, the record here demonstrates that while one function of the service is to provide communications service to the inmate population, the concerns and requirements of corrections authorities are different and often in conflict with those associated with the provision of basic public payphone service. These facts distinguish inmates from the 'general public.'"<sup>26</sup>

Moreover, following the courts, the Commission has specifically recognized that security concerns grant prison authorities the right to enter into exclusive contracts to provide telecommunications for inmates and their families.

We are persuaded by comments of the United States Attorney General, other federal officials, and nearly all who have commented on this issue that implementation of BPP (billed party preference) for outgoing calls by prison inmates should not be adopted. With regard to such calls, it has generally been the practice of prison authorities at both the federal and state levels, including state political subdivisions, to grant an outbound calling monopoly to a single IXC serving the particular prison. This approach appears to recognize the special security requirements applicable to inmate calls.<sup>27</sup>

Contrary to assertions by OC,<sup>28</sup> here the Commission's acceptance of the exclusive contracts that departments of corrections award to inmate calling service providers was not primarily based on a concern for the high cost of implementing billed party preference (BPP). Nor did it depend on whether carrier choice might be exercised by the inmate or the called party. The Commission's primary reason for not adopting BPP was the recognition that special security requirements justified the use of exclusive contracts to provide inmate calling services, as the above quote makes clear.

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<sup>26</sup> See Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, RM-8181, 11 FCC Rcd 7362 (1996) at 25.

<sup>27</sup> See *Billed Party Preference for InterLATA O+ Calls*, 13 FCC Rcd 6122, (1998) at 57.

<sup>28</sup> OC Petition at 12.

The Commission has affirmed this understanding just recently, making clear that legitimate security interests continue to justify the awarding of exclusive contracts by departments of corrections to inmate calling service providers. “For this reason, most prisons and jails contract with a single carrier to provide payphone service and perform associated security functions. Thus, legitimate security considerations preclude reliance on competitive choices, and the resulting market forces, to constrain rates for inmate calling.”<sup>29</sup> OC mischaracterizes MCI’s position that allowing inmates or their families telecommunications choice is “unlawful as a matter of communications policy.”<sup>30</sup> MCI has only maintained that the courts and the Commission have long recognized that security concerns limit the authority of either of these agents to require prison authorities to offer choice of carriers to inmates or their families.<sup>31</sup> MCI and DOCs have maintained though, that OC’s practice of remotely forwarding calls does pose a legitimate security concern, and does violate the New York State Correctional Code, as will be discussed below.

### 3. OC’s Bills Misrepresent its Services

The need to address the validity of OC’s bills to its customers seems ridiculous in light of the fact that OC is not permitted to even provide this service, but MCI addresses

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<sup>29</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Remand and Notice of Proposed Rulemaking*, 17 FCC Rcd 3248 (2002) at 72.

<sup>30</sup> OC Petition at 11.

<sup>31</sup> OC continually refers to “claims” MCI or DOCS has made but fails to introduce any evidence into the record supporting its assertions. MCI wonders how the Commission expects other parties to offer reasoned comment on the issues raised by OC under these circumstances. If no one except OC and MCI are able to comment, it is clear that OC should not have filed a Petition for Declaratory Ruling. The Commission should dismiss OC’s petition for this reason alone. *See* OC Petition at 7, 9, 10, 11, 12, 14, and 16.

this argument nevertheless.<sup>32</sup> Ironically, the section of OC's petition in which it addresses its billing practices underscores several issues.<sup>33</sup> The overall problem with OC's billing is simple – misrepresentation. OC is misrepresenting its business, misrepresenting its relationship with MCI, and misrepresenting the services it is providing to its customers.

OC, by its own admission, states that it is identified on the OC bills as the end-to-end service provider. OC adds, in its continuing attempt to mislead this Commission, that OC has “incorporated the local collect call functionality it obtained from MCI into OC's own end-to-end long distance collect calling service and then billed its customers for the service on an end-to end basis”.<sup>34</sup> This statement is completely false. OC does not, in fact, provide end-to-end service to its customers. MCI, at a minimum, provides the local operator-assisted collect call portion of the inmate call before it is handed off to OC's carrier, in most cases PaeTec. The problem is that MCI has not authorized OC to utilize its service.<sup>35</sup> OC merely pirates the back end of MCI's service for its own gain. OC position is based on the fallacy that it is paying MCI for at least the local portion of

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<sup>32</sup> As a point of clarification, OC is incorrect that MCI initially raised the truth-in-billing obligations in the court litigation as a reason that MCI was blocking OC's calls. MCI raised this issue as one of the several reasons that OC was not able to show its likelihood of success on the merits of its underlying claim.

<sup>33</sup> OC Petition at 7-9.

<sup>34</sup> OC Petition at 8.

<sup>35</sup> See OC Petition at 8.



the service. Contrary to OC's claims, OC did not pay MCI since MCI did not have a billing and collection agreement with PaeTec, OC's LEC.<sup>36</sup>

Moreover, in its bills, OC misrepresents to its customers that by paying OC for inmate payphone service, the customer has paid for the entire call. Even if OC's calling arrangement were permitted, which it is not, MCI would at least need to be compensated for the services it provided. Under the current OC scheme neither OC nor its customers are paying MCI for anything. Moreover, OC would have its customer believe that it provides the end-to-end service even though MCI actually carries the first part of the call. In other words, OC is billing its end-users for services that it is not truly providing.

Finally, OC argues that if there is a requirement that a carrier must bill separately for each functionality that it purchases from other carriers in the provision of end-to-end service, MCI would be in violation of that policy because it purchases switched access service from incumbent local exchange carriers ("ILECs") in its provision of long distance services but does not identify this on its bills.<sup>37</sup> This analogy is without merit. The key distinction is this: MCI *purchases* access services from the ILEC that MCI then uses to provide its long distance services. In the case of OC, it has not purchased anything from MCI, it has stolen MCI's inmate payphone service and then billed its customers for services they misrepresent as having provided.

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<sup>36</sup> See OC Petition, Summary.

<sup>37</sup> OC Petition at 8.

#### 4. OC's Service Clearly Utilizes Unlawful Call Forwarding

OC's claim that its service does not violate DOCs Inmate Rule 121.11 and the prohibition against call forwarding is erroneous.<sup>38</sup> The NY regulation states that, "[i]nmate telephone calls and telephone conversations shall be restricted to the telephone number dialed...Telephone call-forwarding or other third-party phone calls...are prohibited."<sup>39</sup> As discussed in greater detail herein, security reasons dictate strict adherence to the New York regulations that prohibit any forwarding or redirecting of an inmate call.

OC's attempt to distinguish its service from this regulation is baffling. OC claims that its service does not violate the state regulation because each call by an inmate to an OC customer is "directed automatically" to the OC customer's home phone.<sup>40</sup> This is nothing more than semantics by OC. A call that is "directed automatically" in the OC inmate payphone scheme involves remote call forwarding with the use of a carrier's switch near the DOCs facility.<sup>41</sup> In fact, Section 2, A of OC's New York Tariff states that it "...provides a Customer the ability to receive collect calls from a specified location

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<sup>38</sup> OC Petition at 13.

<sup>39</sup> 7 NYCRR § 723.3(e)(11).

<sup>40</sup> OC Petition at 13.

<sup>41</sup> In the background section of its Petition, OC also describes its service and states that OC obtains from PaeTec a "local dial number" in the community where the inmate is imprisoned. PaeTec programs its switches to route that "local" number automatically to the OC customer's home phone number in the distant city where the OC customer lives. *See* OC Petition at 5. Regardless of what OC chooses to call this service on page 5 or page 13 of its Petition, the service is known as remote call forwarding or RCF and is a prohibited practice.

designated by the customer in another exchange area.<sup>42</sup> OC cannot avoid New York state regulations by renaming its practice of call forwarding.

Nor can OC seriously claim that “[n]either OC nor its service facilitates in any way the ability of any OC customer to forward any of his or her calls to any other number, and there is no greater risk that an OC customer would forward a collect call made to that OC customer than there is that an MCI customer would forward a collect call made to that MCI customer.” This statement is ludicrous – OC’s entire business plan is based on remote call forwarding. Moreover, unlike OC, MCI does not tolerate call forwarding or any violations of the NY DOCs regulations. As required by its contract, MCI will block any calls that it knows are being call forwarded, regardless of which parties or carriers are involved.

Additionally, OC notes that it would be willing to notify each customer that both DOCs and OC policy prohibits the forwarding to any other number of any inmate service call.<sup>43</sup> This is preposterous. OC cannot credibly make the claim that it will let its customers know that call forwarding is strictly prohibited when OC employs the call forwarding practice to connect calls to its customers in the first place. In any event, inmates are made aware that call forwarding is prohibited through the publication and availability of the New York DOCs regulations in the correctional facilities. Moreover, DOCs cannot be confident that OC will in any way adhere to DOCs’ security requirements. Unlike MCI, who is contractually bound to honor its commitments, OC is under no obligation to adhere to DOCs’ security requirements.

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<sup>42</sup> See *OC Interexchange Collect Call Tariff* (appended hereto as Attachment 6).

<sup>43</sup> OC Petition at 14.

5. OC's Service Poses Severe Security Risks to NY DOCs' Inmate Telephone System

Under its contract with DOCs, MCI provides a secure telephone system for DOCs' inmates. Pursuant to its contractual obligations, MCI is charged with the responsibility of ensuring that the inmate lines are secure and that the calls are tracked and monitored as described earlier.

Additionally, pursuant to the DOCs Agreement, MCI ensures the security of the inmate telephone system with a \$7 million performance bond. DOCs is assured of MCI's ability to satisfy DOCs' security needs. OC's remote call forwarding service thwarts DOCs' efforts to control inmate calls. For example, due to the remote call forwarding feature of OC subscriber calls, calls placed on OC lines cannot be properly tracked or monitored by MCI or DOCs. MCI and DOCs have no way of knowing whether calls are being forwarded to numbers on the inmate's pre-approved list, or whether they are forwarded to numbers that DOCs has required MCI to block (i.e. phone numbers of judges, prosecutors, witnesses or other individuals whom inmates may not be permitted to call, numbers that have not been pre-approved, or calls to direct other criminal activity.) Further, it is not clear how often or how quickly an OC subscriber can change the number to which the local call is forwarded, so a call that is permissible today may be made impermissible in the future. MCI and DOCs have not control where the call goes once OC begins re-routing it. In addition, the remotely forwarded calls could also be unknowingly violating a variety of other DOCs' security requirements for inmate calls.

In an attempt to alleviate DOCs' security concerns about OC's service, OC has offered to provide the BNA for the relevant OC subscribers.<sup>44</sup> This offer, however, falls far short of curing the security concerns identified by DOCs. DOCs cannot, and should not, rely on the verbal assurances of OC or any other carrier when public safety is involved. The BNA information offered by OC pertains only to the OC subscriber responsible for paying for the service, but bears no relationship to any of the ultimate recipients of inmate calls forwarded through the service. OC offers precisely the kind of call forwarding that DOCs regulations forbid.

The lack of reliable and continuously updated BNA is a major concern to DOCs. Without BNA information or the ability to identify the owner of the telephone number, DOCs is unable to determine the destination of the telephone call. BNA information helps determine where a telephone call terminates, who receives the call, and is often essential in the investigation of criminal activity. By contract, MCI is required to provide BNA data through real time on-line data access and in a batch file transfer.

Further, OC's offer to provide MCI with daily updates of all such OC customer information to place in MCI's database is not a feasible solution.<sup>45</sup> This is not a simple process. Even if OC proved a reliable organization and had the resources to do so, DOCs and MCI would have to spend time and resources in ensuring that the data is received.<sup>46</sup>

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<sup>44</sup> OC Petition at 15.

<sup>45</sup> OC Petition at 16.

<sup>46</sup> As DOCs told the bankruptcy court, OC would need to provide nightly data exchanges and continuous updates of databases as numbers on inmate lists changed. OC would be required to provide DOCs with real time access to its database from a minimum of four DOCs locations. This would require hardware systems at each end, secure data transfer and DOCs would have to design extensive computer programs to make it all work. *See*

MCI currently provides this information pursuant to its contractual relationship -- but what ensures OC's obligation to provide this information? Even if OC complied in a satisfactory manner with the data update requirements there are no assurances that other organizations like OC would provide this data cooperatively. Moreover, the same resource-intensive processes would be required to get the data from those other organizations.

OC has also suggested that if DOCs desires to investigate before permitting the inmate to place calls to any OC customer, it may do so by using existing national reverse directory assistance databases to confirm that the local number the inmate desires to call is assigned to the same person the inmate claims it is assigned to.<sup>47</sup> This method has already proved invalid. In September, 2002, after a conference call with OC, DOCs attempted to obtain BNA data on six numbers from OC. Each of those numbers came back as "error no match...no data" or unlisted with no record found.<sup>48</sup>

In an attempt to allay DOCs' security concerns, OC claims there are several other "investigatory" tools at DOCs' disposal to verify that calls to OC and MCI customers are

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*MCI, Inc., et. al., v. Outside Connection, Inc., Case No. 02/13533, Chapter 11 Adversary Proceeding No. 02/8092A (AJG), Defendant New York State Department of Correctional Services' Objections to Plaintiff Outside Connection's Motion for Preliminary Injunction ("DOCs Objection to Motion for Injunction") dated November 19, 2002 (appended hereto as Attachment 7) at 4-8.*

<sup>47</sup> OC Petition at 15.

<sup>48</sup> On September 13, 2002, DOCs held a conference call with OC to gather information regarding OC's service. As a result of that call and subsequent research into the numbers provided by OC, on September 24, 2002, DOCs informed OC by letter (appended hereto as Attachment 8) that it would not permit inmates to place on their approved list telephone numbers that did not correspond to the area code and exchange of the address of the telephone owner. If any such numbers were on the inmate lists, steps would be taken to block the calls. DOCs Objection to Motion for Injunction at 4-8.

appropriate.<sup>49</sup> This is exactly why DOCs and the majority of other state and federal correctional facilities employ an exclusive contract arrangement for inmate telephone services. There are clear efficiency, cost, and security disadvantages to using more than one telephone service provider. DOCs should not have to expend the endless resources to “investigate” the lines provided by OC or other similar entities.<sup>50</sup> DOCs has avoided this unnecessary administrative burden by working through one company – MCI. Moreover, MCI has guaranteed the provision of BNA data and other security measures through its contract and the performance bond. OC has no similar obligations, and thus cannot provide DOCs any assurance that its security concerns will be met.

#### 6. OC’s Preemption Argument Must Fail

Within its Petition, OC makes an implausible claim that the MCI DOCs contract is preempted by section 253.<sup>51</sup> OC’s preemption arguments are based both on misinterpretations of the law and misrepresentation of the facts. If OC were properly presenting a case for preemption pursuant to section 253, as the petitioner, OC must first demonstrate that section 253 applies to this set of facts, which it does not.

As OC recounts, section 253 is intended to ensure that state or local actions do not erect barriers to competitive entry that would frustrate Congress and the

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<sup>49</sup> OC Petition at 15-16.

<sup>50</sup> As DOCs noted to the Court, if it were required to deal with companies like OC, it would be “ceding its duty to protect and control the inmates in its custody. Moreover, it would be unconscionable to require DOCs to accept at face value the assurances of [OC], or any provider of similar services, as to the integrity of its system and operation and DOCs simply does not have the financial resources to monitor operations like [OC’s], as well as the 67,000 inmates in its care.” DOCs Objection to Motion for Injunction at 7.

<sup>51</sup> OC Petition at 16-20.

Commission's goals of opening telecommunications markets to competition. Contrary to OC's claim, however, it is not a stated goal of the Commission to open the inmate prison payphone arena to competition. As stated above, the provision of telephone service to inmates is quite distinct from traditional telephone service. Unlike the traditional telecommunications marketplace, the inmate prison telephone system is not an arena in which the kind of competition contemplated by the 1996 Act is expected to flourish.

While OC purports to have a right to provide some portion of service to DOCs inmates and their families, the fact is that MCI won the exclusive right to provide of telecommunications services from the prison. OC cannot dissect the components of MCI's service and claim some right to it. Exclusive provision of inmate telephone systems is an arrangement that has been approved by the courts and the Commission.

As MCI demonstrated above, federal courts have granted discretion to prison authorities to govern inmate telephone systems, including the ability to grant exclusive contracts to certain providers.<sup>52</sup> The courts have recognized that rights or privileges granted inmates must be balanced with the public safety. And DOCs has already considered the risks associated with permitting OC to provide daily BNA information, and explicitly concluded that allowing a proliferation of such call forwarding companies would substantially reduce prison security and public safety. Furthermore, the Commission has also recognized that the availability of inmate payphone service is determined by institutional concerns of prison officials, which are different from issues arising from the provision of basic public payphone service. Indeed, DOCs has strong, solid justifications for restricting inmate telephone usage. The Court relied on these

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<sup>52</sup> MCI Comments at Section III. B. 1.



justifications when it denied OC's motion for a preliminary injunction against the blocking of its customers' calls by MCI.

Assuming *arguendo* that section 253 did apply, which it does not, DOCs' grant of an exclusive contract for the inmate telephone system would be encompassed by the exception in section 253(b). As set forth in the Background Section of these comments, DOCs has valid security concerns for the public safety and welfare.

DOCs operates the Call Home Program, which is the result of a careful balance of the inmates' interest in contacting friends and family with the interest of public safety. DOCs chose MCI as the single provider of telephone service for that program. It is more efficient and cost effective for DOCs to handle data supplied by one provider because DOCs needs the provider to have special equipment to monitor phone calls, block unlawful calls and provide quick access to call data. Furthermore, it is of utmost importance that DOCs knows the destination of the inmates' calls. OC's remote call forwarding service thwarts this knowledge. While OC claims that it controls the forwarding of calls made by inmates, OC is not contractually obligated to do so, nor is it under any obligation to do so. DOCs must be secure in the knowledge that the provider of inmate telephone service can fully address the prison's security concerns. As discussed above, MCI has gone through the process necessary to demonstrate to DOCs that MCI has the capability to meet all security requirements.

Courts have repeatedly sustained prison telephone systems that require inmates to place collect calls through one service provider. Commission preemption here would seriously impact DOCs' ability to maintain a secure inmate telephone system. DOCs, or other prisons systems, should not be forced to deal with multiple entities in delivering telephone service to inmates. If

the costs proved too great, prison systems could decide not to grant prisoners telephone privileges at all.

#### **IV. CONCLUSION**

For the foregoing reasons, MCI respectfully requests that the Commission dismiss OC's Petition for declaratory ruling, or in the alternative, deny the relief requested.

Respectfully submitted,

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